LEE YU LAN v. LIM THAIN CHYE

[O.C.J. (Peh Swee Chin J.) February 10, 1983]
[Kuala Lumpur – Divorce Petition No. 85 of 1981]

Family Law – Divorce – Maintenance – Petitioner granted maintenance and 1/3 of proceeds of sale of matrimonial home – Past maintenance from antecedent date of neglect to maintain also granted – Law Reform (Marriage and Divorce) Act 1976, ss. 76 & 77 (1) – Married Women and Children (Maintenance) Act 1950.

The petitioner wife was granted a *decree nisi* on August 24, 1981. She took out the present notice of application for ancillary relief on October 20, 1982 for herself and on behalf of her 2 minor children, one aged 17 and the other 7. Upon hearing the said notice, certain orders were made on December 11, 1982. The petitioner appealed against the said orders.

The notice had asked for an order that (1) the sale of the matrimonial home be set aside; (2) that the petitioner be granted 1/2 share of the said home; (3) alternatively that she be granted 1/2 share of the sale of the said home; (4) that she be paid a lump sum in lieu of all her future claims for maintenance; (5) alternatively she be granted $1,000.00 per mensem as maintenance; (6) that each of her two minor children be paid $400.00 each per mensem and a further sum of $40,000 out of the said proceeds of sale to be held in trust on the children's behalf; and (7) costs.

The affidavit of the petitioner stated that she was married to the respondent for 26 years before the break-up of the marriage. The petitioner deposed that she had contributed to their house (the matrimonial home) by her caring and rearing the children at home and other general duties attendant to her housewifely duty. She therefore claimed to a share of the matrimonial home under section 76 of the Law Reform (Marriage & Divorce) Act 1976. The matrimonial home was bought by the respondent and he sold it for $191,000.00 of which $41,000.00 was paid by the purchaser to the respondent as deposit leaving a balance of $150,000.00 the payment of which had been held up due to the present proceedings.

Held: (1) there would be no order setting aside the sale because such an order would be obviously wrong for the purchaser who had no notice of the petition's adverse claim had been in possession. Further, the purchaser, a very proper and essential party as regards the order of setting aside the sale, was not before the court;

(2) the petitioner should be awarded one-third of full purchase price of $191,000.00;

(3) the petitioner's claim for $40,000 out of the proceeds of sale for the benefit of the 2 minor children to be put in a trust fund is unknown to the Law Reform (Marriage and Divorce) Act 1976 and could not be entertained;

(4) the Court would not be precluded in the absence of an express provision to that effect, from making any order for past maintenance by virtue of Married Women and Children (Maintenance) Act 1950, from an antecedent date of neglect or refusal to maintain. The petitioner would therefore be awarded $200.00 per month for past maintenance and $600.00 per month payable in advance for the period of 6 months from December 1, 1982, all the sums to paid out of the balance sum that would be left in the hands of the respondent.

DIVORCE PETITION.

C.H. Liew (Miss) for the applicant/petitioner
Chong Thian Fook for the respondent.

Cur. Adv. Vult.

Peh Swee Chin J.: The petitioner/wife was granted a *decree nisi* on August 24, 1982 and took out the present notice of application for ancillary relief on October 20, 1982 for herself and on behalf of her two minor children, one aged 17 and the other 7. Upon hearing the said notice, certain orders were made on December 11, 1982 and from these orders of this Court the petitioner/wife has now appealed.

The notice had asked for an order that (1) the sale of the matrimonial home be set aside; (2) that the petitioner be granted 1/2 share of the said home; (3) alternately that she be granted 1/2 share of the proceeds of sale of the said home, the sale price being $191,000/-; (4) that she be paid a lump sum in lieu of all her future claims for maintenance; (5) alternatively she be granted $1,000/- per mensem as maintenance; (6) that each of her two minor children be paid $400/- each per mensem and a further sum of $40,000/- out of the said proceeds of sale to be held in trust on the children's behalf; and (7) costs.

From the only affidavit of the petitioner filed herein, she deposed that she was married to the respondent for 26 years before the break-up of the marriage. She further deposed that she had "contributed" to their house, (the original matrimonial home in Taman Seputeh, Kuala Lumpur), by her "caring and rearing the children at home" and "other general duties attendant" to her "housewifely" duty. These allegations, it will be seen, formed the basis of her claim to a share of the house under section 76 or the Law Reform (Marriage & Divorce) Act, 1976. This house shall be hereafter referred to for convenience rather than for precision, as the matrimonial home. She admitted that the matrimonial home was bought by the respondent and the family moved into it in 1969. She then told of the fights and quarrels from 1975 onwards when the respondent began to cohabit with the co-respondent. Respondent neglected his work it was said, and his business as a contractor folded up some time in 1980. The respondent shifted the whole family to

another house where the family stayed upstairs and carried on the business of a coffee shop downstairs, the purpose of such shifting being to let out the matrimonial home to help pay family expenses. Apparently peace and happiness appeared to elude the family with the respondent finally leaving the new address to live with the co-respondent aforesaid. While denying that the respondent was jobless, the petitioner told of the rough time, earning a living for herself and the minor children. On the date of hearing of this application, learned counsel for the petitioner very correctly conceded that the petitioner had been earning between $300/- and $400/- per month as the owner of a mee stall. The matrimonial home, it appeared, had been sold by the respondent for a total sum of $191,000/- of which $41,000/- was paid by the purchaser to the respondent as deposit, leaving a balance of $150,000/- the payment of which had been held up due to these proceedings. She further alleged that the respondent had been gainfully employed at a monthly salary of $1,700/- by one D D C Construction Sdn. Bhd., Pudu, Kuala Lumpur.

The respondent, in his affidavit in reply, made certain allegations, about some alleged impropriety between the petitioner and one Ah Meng and that he was eventually forced to leave in January, 1981. The cause of his leaving the new address would appear to be relevant as it will be seen that the learned counsel for the petitioner would be claiming past maintenance to take effect from January or February, 1981 when the alleged neglect to maintain first occurred. He alleged that, on stopping his business, he sold what was left of his business assets and from such proceeds gave $25,000/- to the petitioner to start the coffee shop and to rent the new family home. This was denied by the petitioner who said that elder son and daughter had contributed $5,000/- and the coffee shop was started in partnership with the said Ah Meng. He said that, except for three months from April, 1982 to June, 1982, when he had a job at $500/- per month, he was unemployed thereafter because the "site office" where he worked closed down. He could go to Sabah where he appeared to be very confident of getting a job but the petitioner had detained his passport. (According to learned counsel for the respondent, legal proceedings were in fact filed in connection with such detention of passport, those proceedings terminated in favour of the petitioner and these proceedings were not denied by counsel for petitioner). To all the prayers of the petitioner, he made only one offer of a lump sum of $50,000/- for the maintenance of the petitioner and children, this sum obviously was to come from the proceeds of sale of the matrimonial home.

On the question of the matrimonial home, I did not make an order setting aside the sale because such an order would be obviously wrong for the purchaser who had no notice of the petitioner's adverse claim, has been in possession and this was not challenged by the petitioner. Further, the purchaser, a very proper and essential party as regards the order of setting aside the sale, was not before the Court. There was also an alternative claim for 1/2 share of the proceeds of sale. On the proceeds of sale, her claim would appear to be based on her contribution to the family welfare only, (section 76 (4)), and I upheld such claim. Section 76(4) itself provides for the Court to divide such proceeds of sale in such proportions as the Court thinks reasonable, except that the acquirer of the property in question should receive a greater share, i.e. more than one-half. I took into consideration the allegation of the respondent which I accepted that he had to pay debts. His business closed down, due to losses, the Court presumed, and there could have been some creditors who presumably continued to press for payment for some of the liabilities. In this connection, I accepted the allegation that he sold the business assets and utilized the proceeds substantially for starting the coffee shop and renting the new family home. I found it difficult to believe that the two elder children had the ability to contribute $5,000/ towards the coffee shop business. I was also aware of my proposal to make order for maintenance for her. All circumstances considered, I exercised my discretion in letting her have $60,000/- or 2/5th of the balance sum of $150,000/- as yet to be paid by the purchaser, and this worked out to be roughly equivalent to about 1/3rd of the full purchase price of $191,000/-. In this connection, there was a clerical or mathematical error, a minor one, when I made the order for the sum of $60,400/- of 2/5th of the said balance sum of $151,000/- whereas it should have been $60,000/- or 2/5th of the balance sum of $150,000. I hope this will be amended to accord with the correct calculation.

On the petitioner's claim for $40,000/- out of the proceeds of sale for the benefit of the two minor children, to be put in a trust fund, in my view, the claim is unknown to our Law Reform (Marriage and Divorce) Act, 1976 and could not be entertained.

On the question of maintenance, I accepted the allegation of the respondent that he was unemployed (except for a period of three months from April to June, 1982), since February, 1981. The evidence was plausible enough; his desperation and legal proceedings to get his passport, ill-conceived proceedings apparently, for going to Sabah where he was confident of getting a job, his selling the only known valuable asset, viz. the matrimonial home. The petitioner on the other hand, had been earning some income, one way or another, and up to the hearing of this application, had been and is believed still to be earning $300/- to $400/- per month. I considered also that even an unemployed husband could be legally ordered to pay a nominal sum, for his spouse or ex-spouse, and his children. Further, after paying $60,000/- to the petitioner out of the proceeds of sale, there would be still a very handsome sum in the hands of the respondent and there was no time like now to utilize part of the said sum to pay for past maintenance and for same in advance. I also considered that the job in Sabah could possibly fetch some good income but as to how much, the Court would decline to be a fortune teller and would leave it to the petitioner to apply for increase in maintenance if circumstances later justify it. I also was of the view that since the respondent had already incurred money for maintaining his two minor children between January, 1981 and the date of hearing of the application, an order for past maintenance should be in her favour. I took into account the responsibility on the part of the respondent for the breakdown of the marriage, in connection with the co-respondent, but I could not ignore the respective needs and means of both the petitioner and respondent. Considering all the circumstances, I made an order for payment of a smaller sum of $200/- per month for past maintenance in favour of petitioner. Because of the prospect of a good job in Sabah, and because of the cash now happening to be available, I made an order for maintenance at a total sum of $600/- per month, payable in equal shares to or for the petitioner and her two minor children to be payable in advance for the period of six months from December 1, 1982, all the sums to be paid out of the balance sum that would be left in the hands of the respondent. After the petitioner had taken the sum of $60,000/-, I bore in mind, that should his income in Sabah prove to be substantial, application could be made for variation of the present order for maintenance of $600/-. It was not considered necessary to incorporate this right of variation in the orders the Court made and they included the order that the respondent, his servants or agents be restrained from dealing in any way with the said balance sum of $150,000/- until the payment of the said sum of $60,000/- the past maintenance and maintenance for six months in advance aforesaid.

In the event of a cross-appeal, I think I ought to deal with the order for past maintenance, i.e. from January, 1981 to date of hearing of the present application. Under section 77 (1) of the Law Reform (Marriage and Divorce) Act, 1976, it is provided that maintenance can be ordered, (a) during the course of any matrimonial proceedings, (b) when granting or subsequent to the granting of a decree of divorce or judicial separation and (c) when a wife or former wife is found to be alive after a decree presuming her to be dead. In this connection, application for maintenance was made expressly under this Act. The wording of this section 77 (1) may appear to suggest that an application for maintenance could only be made for maintenance payable or commencing as from the date of application within any of the three periods aforesaid, but in my view, the Court would not be precluded in the absence of an express provision to that effect, from making any order for past maintenance by virtue of Married Women and Children (Maintenance) Act, 1950, from an antecedent date of neglect or refusal to maintain.

Order accordingly.

Solicitors: *C.H. Liew & Co.; Chong Thian Fook & Partners.*

TAN POEY KHENG v. MA PENG KIAT

[O.C.J. (Mohamed Dzaiddin J.) February 21, 1983]
[Kuala Lumpur – Originating Summons No. 983 of 1982]

Practice & Procedure – Ex parte application – Principles to be applied – R.H.C. 1980, O. 32 r. 6.

Family Law – Custody of children – Ex parte application – Principles to be applied.

This was an application by the respondent to set aside the Order of Court made *ex parte* on November 19, 1982 granting the applicant interim custody of the 2 infant children until the final disposal of the main case. The respondent was dissatisfied with this *ex parte* application and contended that it should have been made *inter partes* and that he be given the right of being heard.